



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 18, 1996

The Honorable J. Collier Adams, Jr.
Cochran County Attorney
109 West Washington
Morton, Texas 79346-2537

Letter Opinion No. 96-004

Re: Whether article XVI, section 40 of the Texas Constitution excepts a county commissioner from the common-law doctrine of incompatibility (request for reconsideration of Attorney General Opinion DM-311 (1994)) (ID# 31414)

Dear Mr. Adams:

Your letter to this office raises questions about our conclusion in Attorney General Opinion DM-311 (1994). That opinion determined that the offices of county commissioner and trustee of a public school district are incompatible under the common-law doctrine of incompatibility, so that one person may not serve in both offices. You question this conclusion, citing the express exception for county commissioners found in article XVI, section 40 of the Texas Constitution. This constitutional provision states in part: "No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public, . . . [and other specifically named offices]." This constitutional provision first states a general rule prohibiting any person from holding more than one civil office of emolument and then excepts county commissioners and specific other officers from the general rule. Thus, even though a county commissioner is an officer of emolument, he may hold another office of emolument without violating article XVI, section 40. The language of this constitutional provision does not affirmatively authorize a county commissioner to hold a second office without regard to the common-law doctrine of incompatibility. It merely excepts him from the restriction on holding two offices of emolument. The restrictions of article XVI, section 40 and the common-law doctrine of incompatibility are cumulative, and the opinions of this office have long treated them as such. See Attorney General Opinions O-3522 (1941), O-998 (1939).

You refer us to *Gaal v. Townsend*, 14 S.W. 365 (Tex. 1890), in connection with your view that the express exception for county commissioners in article XVI, section 40 of the Texas Constitution prevails over the common-law doctrine of incompatibility. *Gaal v. Townsend* was brought to determine whether a county commissioner vacated his office

by accepting the office of mayor of a city. The supreme court affirmed a dismissal of the suit for want of proper parties, but expressed its opinion on the merits. It stated that the exception in article XVI, section 40 did not merely authorize a county commissioner to hold one of the other offices expressly subject to the exception, but permitted him to hold "at the same time any other office." *Id.* at 366. In making this statement, the court did not address the question of incompatible offices. *Id.* *Gaal* does not support a conclusion that the express exception for county commissioners in article XVI, section 40 of the Texas Constitution prevails over the common-law doctrine of incompatibility. A later case cited *Gaal* for the proposition that "a person may at the same time hold the office of notary public and another office, without there being *necessarily* any conflict of interest." *Hannah v. Walker*, 409 S.W.2d 949, 950 (Tex. Civ. App.--Dallas 1966, no writ) (emphasis added). In *Turner v. Trinity Indep. Sch. Dist.*, 700 S.W.2d 1 (Tex. App.--Houston [14th Dist] 1983, no writ), the court held that a school board member could also serve as a justice of the peace. The court addressed both the common-law doctrine of incompatibility and article XVI, section 40 of the Texas Constitution, finding that neither provision would prohibit the individual from holding both offices.

You also raise a question about the existence of the doctrine of incompatibility at common law. Section 5.001 of the Civil Practice and Remedies Code provides that "[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state."

The Texas Supreme Court has stated that this provision incorporates the common law declared by the courts of the several states, and not the common law in force in England in 1840. *Grigsby v. Reib*, 153 S.W. 1124 (Tex. 1913). It adopts the provisions of the common law so far as they are not inconsistent with the conditions and circumstances of the people of the state. *Id.*; see also *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935). The Texas Supreme Court has recognized the common-law doctrine of incompatibility in cases such as *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted). Accordingly, your questions do not require us to reconsider our conclusion in Attorney General Opinion DM-311.

S U M M A R Y

Article XVI, section 40 excepts the offices of justice of the peace, county commissioner, notary public, and other specifically named offices from its restriction on holding two civil offices of emolument, but it does not except those offices from restrictions on dual-office-holding based on the common-law doctrine of incompatibility.

Very truly yours,

A handwritten signature in cursive script that reads "Susan Garrison". The signature is written in black ink and is positioned above the printed name and title.

Susan Garrison
Assistant Attorney General
Opinion Committee